SUBMISSION TO THE SENATE STANDING COMMITTEE ON BANKING, TRADE AND COMMERCE

Regarding
Bill S-8, An Act To
Amend The Copyright Act

The Association of Universities and Colleges of Canada

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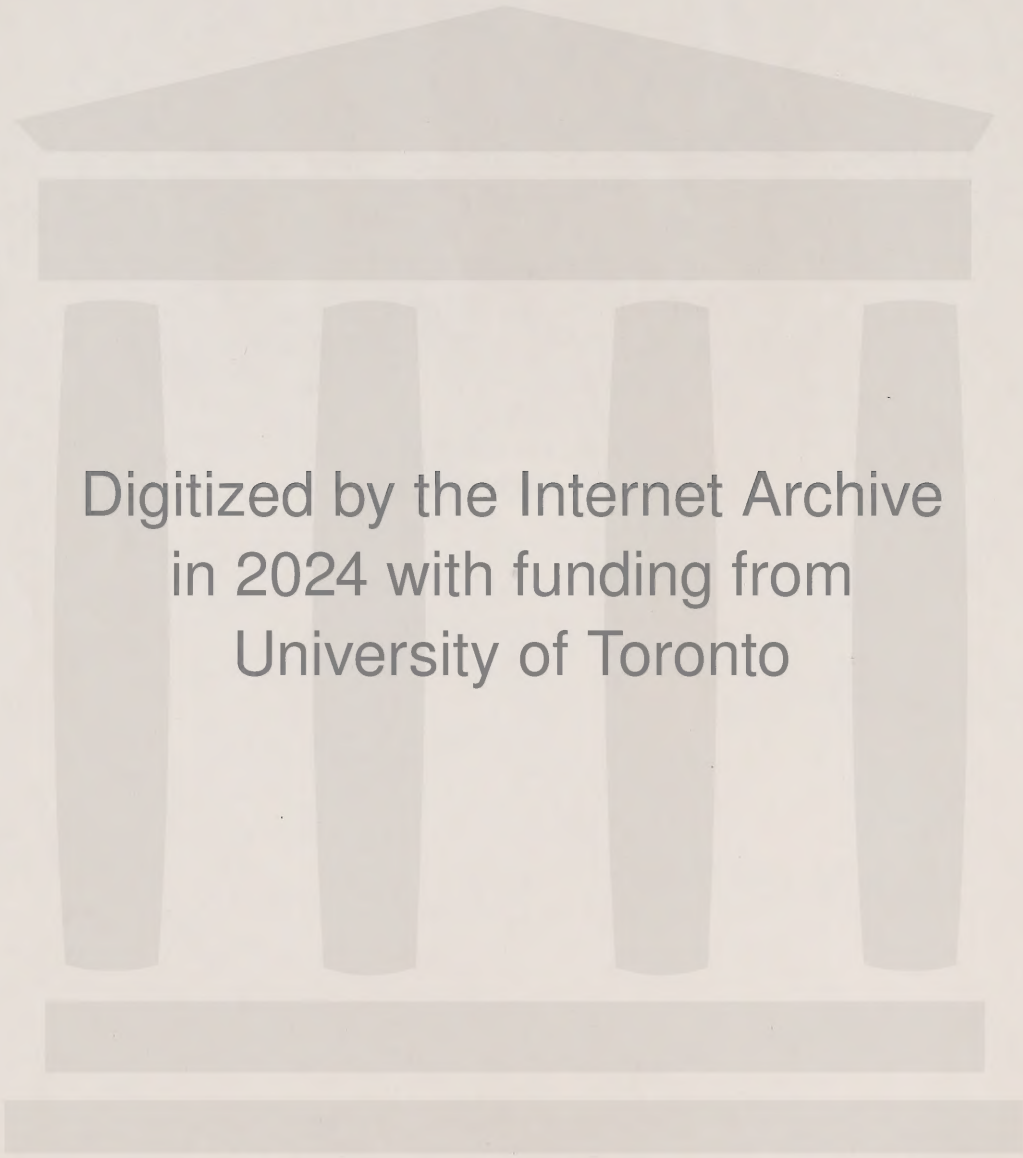

SUBMISSION TO THE SENATE STANDING COMMITTEE ON BANKING, TRADE AND COMMERCE REGARDING BILL S-8, AN ACT TO AMEND THE COPYRIGHT ACT

The Association of Universities and Colleges of Canada (AUCC) is a national voluntary association representing 89 degree-granting institutions across Canada. Our member institutions include all of Canada's largest multi-facet universities widely recognized as education and research establishments, as well as a number of smaller liberal arts institutions also involved in research and the dissemination of knowledge through education, research and publication.

Our member institutions are both substantial users and substantial creators of intellectual properties included within the definitions of the Copyright Act. They are very much aware of the delicate balancing that copyright law must represent, and of the compromises necessary to achieve this balancing.

The AUCC supports the intent and the text of Bill S-8, not because it completely answers our concerns about the Copyright Act, but because it represents the "elusive" compromise between the interests of copyright owners and those of legitimate users and of Canadian society as a whole.

Copyright Involves Delicate Balancing

Copyright is not an inalienable or absolute property right. It is a legal right conferred by states, and is part of the mix of legal and policy instruments used by states to stimulate **both creation of innovative ideas and public access to those ideas.** Within parameters set by two international conventions, the terms, conditions and limitations of copyright will vary from state to state and over time. Developing the most appropriate copyright law for Canada, or any country, involves both a delicate balancing of the interests of creators and those of consumers, together with a balancing of individual interests with those of society at large.

As Canada prepares for the information-based economy of the 21st century, it must have a legal and policy framework that encourages research, innovation and creativity, and facilitates the rapid dissemination of new ideas and discoveries.

The revisions to the Copyright Act (Bill C-60) and the consultations leading to Phase II have all assumed that copyright is an economic question and that the sole purpose of copyright revision is **to stimulate intellectual creation by assuring a reasonable economic return to the creator.** This assumption is too restrictive and, when viewed in a global context, erroneous.

Most of the creations utilized by our universities are scientific in nature and are produced in order to advance knowledge. In this environment, the primary incentive for creation is **not** direct economic return in exchange for an intellectual investment. The more important incentive is the enhanced reputation that results from wide dissemination of the creator's ideas and research findings, and from his or her ability to advance knowledge. Closely related to this incentive are several others -- career advancement, access to increased research funding, and the personal satisfaction of achieving a career goal.

Wide dissemination of the creator's ideas and findings thus provides a very important incentive for intellectual creation and innovation. But it is crucial to the whole process of intellectual and scientific creation in another sense as well. Neither knowledge nor creativity can exist in a vacuum. Other intellectual property laws related to scientific and technological advancement have acknowledged the need and obligation **to facilitate access to and transfer of ideas**. For example, by accelerating access to patent disclosures, revisions to patent laws have recognized the need to provide other researchers with speedy access to knowledge. Other pending legislative proposals in the fields of science and technology will likely provide research exemptions.

As Canada prepares for the 21st century, federal legislators must recognize that the widespread transfer of knowledge through written text is fundamental to innovation and creativity. However well-intentioned, copyright law that emphasizes economic compensation of creators to the exclusion of the interests of legitimate users and of society as a whole in the dissemination of ideas, will act as an obstacle and a disincentive to scientific innovation in this country.

Costs of Licensing Not the Main Issue

Too often, the submissions made by the consumer side of the copyright issue have been characterized as attempts to legalize piracy and to avoid the economic consequences of enhanced copyright protection for creators. As applied to the universities' position, such a characterization is both inaccurate and unfair.

AUCC has certainly raised the question of costs and the economic impact of the proposed revisions, as, for example, in our submission to the House of Commons in October 1987:

> "...the economic impact of the proposed revisions has not been substantially addressed. We can anticipate that increased costs will be passed on to the users within the university community, resulting in greater selectivity and the rejection of those creations for which the increased costs are not justified for educational purposes." (page 13)

However, this has never been the main issue. For example, in the same 1987 submission, AUCC made the following arguments, most of which relate to the issue of user access:

- Phase I (Bill C-60) of revisions to the Copyright Act should be delayed until all legislative revisions are known so that the discussion can be an informed one;

- an extension of copyright protection beyond international obligations will place Canada at a competitive disadvantage because of the requirement of "national treatment";

- public exhibition rights should be contractual rights and not property rights;

- protection of anonymity and pseudonymity should either be a contractual right outside of the Copyright Act or, alternatively, be addressed as a privacy issue;

- protection of computer software under the Copyright Act should be considered an interim measure pending the development of a comprehensive property right specific to computer software;

- prohibiting the use of a work "in association with" a product, service, cause or institution should be reworded to prohibit the use of a work for the benefit of a product, service, cause or institution;

- collectives as provided for in C-60 are inadequate and "fair use" should be adopted as a legislated defence;

- protection of an economic right should be dependent upon the registration of that right to allow users to ascertain ownership when seeking clearances or licences;

- collectives should be described in the same regime as performing rights societies;

- blanket licences should be provided for by legislation and once obtained should protect against all infringement claims whether or not the work is included in the collective repertoire; and,

- the jurisdiction of the Copyright Board should be extended to allow licensing of use of unpublished works.

In a similar vein, AUCC's March 1988 submission to the Senate Committee on Banking, Trade and Commerce regarding Bill C-60 stated explicitly that:

> "Universities can adapt to Bill C-60 for a large part of copyrighted creations, albeit often at substantial costs. However, this will require that, as a rule, creators waive rights granted by Bill C-60.
>
> We cannot adapt, however, to the added protection extended to fugitive creations, as described above, nor to those works for which the creator obtains absolute control." (page 5).

Costs cannot be ignored -- they **will** have an impact on access to culture and knowledge. But to suggest that universities are only worried about the additional costs arising from copyright revision is to understate and, indeed, to misrepresent the concerns that AUCC has consistently advanced throughout the revision process.

The economic aspects of Copyright Act revision can be addressed through enhanced contractual agreements, additional public funding and selectivity of materials used in the educational process. Inability to access creations in a timely manner **cannot** be similarly addressed and amounts to an immeasurable loss to the development and transmission of knowledge.

Collectives Under Bill C-60 Not an Answer

The collectives created under Bill C-60 are not an answer to the needs of educational institutions. Nor do they address the long-term educational needs of this country. If it is to avoid stagnation, Canada must define education as including the discovery as well as the transmission of knowledge, and not limit it to the traditional but outmoded perception of classroom education.

Supporters of the concept of collectives embodied in Bill C-60 have frequently argued that performing rights societies are evidence that collectives can provide broad and easy access to culture and knowledge. Why then are the collectives established under Bill C-60 so fundamentally different from performing rights societies?

There are a number of reasons why collectives do not, for the time being, answer the needs of educational institutions:

First, the existing collective for reprography is not prepared to negotiate access to its repertoire in a timely manner. Bill C-60 has been law since June 1988. To our knowledge, negotiations regarding licensing have been undertaken with governmental authorities but not with universities, colleges, libraries, school boards, museums or businesses.

Second, we understand that the repertoire of the reprography collective, CanCopy, offers only limited access to commercial publications and almost no access to scientific and non-commercial works, including those protected by Crown copyright.

AUCC has asked for access to the repertoire of the reprography collective, but has not yet been provided with that repertoire. Hence, our understanding is based on second-hand information. For example, a recent Globe and Mail article reported that the collective represents "nearly two thirds of Canada's publishers and about 5,000 creators (writers, poets)..." (Saturday, February 24, 1990, page C-1). This implies that one third of publishers' repertoires in Canada alone are not yet accessible through the collective. Furthermore, to put the figure of 5,000 creators in perspective, there are 36,000 academics in Canadian universities, all of whom are, at one time or another, creators of works protected by copyright. And, of course, Honourable Senators are also creators of public statements, policy speeches, writings and similar fugitive literature used by some of our academics as they seek to explain our society, our system of government, and our laws and public policies. These works are also absent from the existing repertoire. There is clearly a vast gap between the available repertoire and the needs of our universities and academic researchers.

Third, collectives will not and probably cannot include in their repertoires those unpublished works that are now protected under the Copyright Act with eternal copyright. Fugitive literature and the works of "renegade" creators will not be included in collective repertoires.

Fourth, Canada is required by international obligation to extend national treatment to foreign creations in those jurisdictions that are signatories to the international conventions -- including virtually all jurisdictions whose works are most relevant to our institutions. "National treatment" means that those rights recognized by the Copyright Act must be extended to works emanating from jurisdictions that are signatories to the international conventions even though those foreign jurisdictions do not extend similar rights to Canadian creations in their jurisdictions.

Studies have shown that as many as 78% of the works photocopied in libraries and educational institutions are of foreign origin. Unless and until Canada's collectives have bilateral agreements with their foreign counterparts, licensing through the collectives will not provide the needed access to creations from Canada's major trading partners. Even if those bi-lateral agreements are negotiated, access will only be provided to works in the repertoires of collectives and not to the vast amount of literature outside those repertoires. Scientific and scholarly creators in other countries have no greater incentive to belong to such collectives than do their Canadian counterparts.

Fifth, without a legislated requirement for collectives to offer a blanket licence, there is no assurance that such licences will be available. The AUCC notes, with some concern, that the only blanket licence previously available through the performing rights societies has now been removed from the tariffs and is no longer available.

Sixth, while the Copyright Board created by Bill C-60 may settle the terms and conditions of a licence offered by a collective, it has no jurisdiction whatsoever to review an outright refusal of licence or to deal with a work that is not included in the repertoire of a collective, unless the owner of the published work cannot be located.

If the collectives had been structured on the model of the performing rights societies -- with a published repertoire, a published tariff, and access to the repertoire on payment of the published tariff -- our member institutions could have expected relative ease of access (albeit very limited for foreign creations) to unpublished works, fugitive literature and works of "renegade" creators. They would have been spared both the delays inherent in individually negotiated licences and the possibility of absolute prohibition of access even to those works which are included in the repertoire.

Bill S-8 a Reasonable Compromise

To this point, we have argued that Bill C-60 did not achieve the necessary balance between the interests of creators and users, and between the interests of individual creators and of society as a whole. Bill S-8 would partially redress this imbalance.

Some critics of Bill S-8 argue that it creates an educational exemption, and that including such an exemption in the Copyright Act amounts to an expropriation. We disagree. Any property right is subject to legal limitations, and expropriation occurs only when the rights commonly recognized by law are removed from one or a limited number of right owners. Even if we were to concede (which we do not) that Bill S-8 would create an educational exemption, the inclusion of such an exemption would only amount to a definition of the quality of the right and would never amount to "expropriation".

In fact, Bill S-8 proposes not an educational exemption but rather a defence to an infringement action -- a limited but essential defence -- when a licence to use copyright material "is not obtainable on reasonable terms and conditions". The Bill **does not in any sense** propose a general educational exemption.

We cannot anticipate entirely the implications of the proposed subsection 7 to section 27 of the Copyright Act, but the introduction of a defence left to judicial interpretation is not a novel step. The principle of flexible defences in the Copyright Act allowing the courts through "hindsight" to assess each case on its merits was accepted by the House of Commons Sub-Committee on the Revision of Copyright in its "A Charter of Rights for Creators" (October 1985):

> "Some submissions to the Sub-Committee requested that fair dealing be 'defined' so as to provide certainty. The Sub-Committee is of the view that it is not possible to define fair dealing without sacrificing essential flexibility. To be effective, any fair dealing provision must be flexible. It must be left to the discretion of the courts to mould and shape according to technological developments and existing practices." (page 64)

This reasoning led to the Sub-Committee's Recommendation No. 83: "The nature of fair dealing as a defence to an action for infringement should not be changed" (page 65). The "Government Response to the Report of the Sub-Committee on the Revision of Copyright" (February 1986) agreed with this recommendation in principle (page 13).

We can anticipate, however, that a court of law will never conclude that a licence to utilize copyright-protected material is obtainable "on reasonable terms and conditions" if the educational institution could reasonably have sought out the copyright owner. Courts will acknowledge the monopolistic aspects of the Copyright Act and respect the owner's right to reasonable compensation and control. They will recognize the defence only if the terms and conditions required for the licence are either outrageous or overly restrictive as to use.

It should be kept in mind that in cases where a licence is obtainable from a collective, an administrative tribunal -- the Copyright Board -- is empowered to determine whether the terms and conditions imposed on that licence are reasonable. Creators and legislators should rest assured that in such cases, the courts will defer to the Copyright Board rather than accept a defence which fails to recognize legislated avenues of redress where terms and conditions are perceived to be unreasonable.

In summary, Bill S-8 would create a very limited defence that would apply only to those works where licences are not available from collectives and where the copyright owner either is unavailable or imposes outrageous terms and conditions in response to licensing applications. It would not afford a defence to the infringement of rights which are available through licensing by a collective that is prepared to negotiate licences and whose reasonableness can be tested before the Copyright Board.

Bill S-8 may not go as far as many in the university community might wish in guaranteeing access to knowledge to promote education. However, AUCC supports Bill S-8 as the only reasonable accommodation -- the balanced compromise that has proven so elusive throughout the copyright law revision process.

Summary and Conclusion

In this submission, we have argued that:

1. Copyright is not an inalienable or absolute property right. It is a legal right conferred by states, and is part of the mix of legal and policy instruments used by states to stimulate both the creation of innovative ideas and public access to those ideas.

2. Developing the most appropriate copyright law for Canada, or any country, involves a delicate balancing of the interests of creators and those of consumers, and a balancing of individual interests and those of the wider society.

3. As Canada prepares for the information-based economy of the 21st century, it must have a legal and policy framework that encourages research, innovation and creativity, and facilitates the rapid dissemination of new ideas and discoveries.

4. The revisions to the Copyright Act (Bill C-60) and the consultations leading to Phase II have all made the overly restrictive assumption that copyright is an economic question and that the sole purpose of copyright revision is **to stimulate intellectual creation by assuring a reasonable economic return to the creator.**

5. In the university environment, the primary incentive for creation is **not** direct economic return in exchange for an intellectual investment, but rather the enhanced reputation that results from wide dissemination of the creator's ideas and research findings.

6. Wide dissemination of the creator's ideas and findings is crucial to the whole process of intellectual and scientific creation in another sense as well. Neither knowledge nor creativity can exist in a vacuum. Other intellectual property laws related to scientific and technological advancement have acknowledged the need and obligation **to facilitate access to and transfer of ideas.**

7. However well-intentioned, copyright law that emphasizes economic compensation of creators to the exclusion of the interests of legitimate users and of society as a whole in the dissemination of ideas will act as an obstacle and a disincentive to scientific innovation in this country.

8. It is both inaccurate and unfair to portray the universities' position on copyright as an attempt to legalize piracy and to avoid the economic consequences of enhanced copyright protection for creators. In fact, the main issue for the universities has always been access to and dissemination of ideas.

9. Costs cannot be ignored -- they **will** have an impact on access to culture and knowledge. However, the economic aspects of Copyright Act revision can be addressed through enhanced contractual agreements, additional public funding and selectivity of materials used in the educational process. Inability to access creations in a timely manner **cannot** be similarly addressed and amounts to an immeasurable loss to the development of knowledge and its transmission.

10. The collectives created under Bill C-60 are not an answer to the needs of educational institutions. Nor do they address the long-term educational needs of this country. There are a number of reasons:

    - the existing collective for reprography is not prepared to negotiate access to its repertoire in a timely manner;

    - the repertoire of the reprography collective, CanCopy, appears to offer only limited access to commercial publications and almost no access to scientific and non-commercial works, including those protected by Crown copyright;

- collectives will not and probably cannot include in their repertoires those unpublished works that are now protected under the Copyright Act with eternal copyright;

- Canada is required by international obligation to extend national treatment to foreign creations in those jurisdictions that are signatories to the international conventions -- including virtually all jurisdictions whose works are most relevant to our institutions. Consequently, unless and until Canada's collectives negotiate bilateral agreements with their foreign counterparts, licensing through the collectives will not provide access to creations from Canada's major trading partners;

- without a legislated requirement for collectives to offer a blanket licence, there is no assurance that such licences will be available; and,

- while the Copyright Board created by Bill C-60 may settle the terms and conditions of a licence offered by a collective, it has no jurisdiction whatsoever to review an outright refusal of licence or to deal with works that are not included in the repertoire of a collective.

11. Bill C-60 did not achieve the necessary balance between the interests of creators and users, and between the interests of individual creators and of society as a whole. Bill S-8 would partially redress this imbalance.

12. Bill S-8 proposes not an educational exemption but rather a limited defence to an infringement action when a licence is not available from a collective and where the copyright owner either is unavailable or imposes outrageous terms and conditions in response to licensing applications. It would not afford a defence to the infringement of rights which are available through licensing by a collective that is prepared to negotiate licences and whose reasonableness can be tested before the Copyright Board.

In conclusion, Bill S-8 does not meet all the needs of educational institutions of Canada nor the needs of research and scholarship but it does provide the balanced compromise between the rights of creators and those of copyright owners which has proven so elusive throughout the process of copyright law revision.

Of course, Phase II of the revisions to the Copyright Act might satisfactorily address the concerns of the educational institutions of Canada. However, the introduction of Phase II has already been delayed too often at the expense of the vital needs of this country; and further delays can only be expected, with little hope that Phase II will even begin to address our concerns about access to non-commercial works.

Passage of Bill S-8 is therefore urgent because, at present, respecting some provisions of Bill C-60 has severe negative consequences for education and research in this country. Surely it is not the policy of the federal government that the respect of a law be dependent solely upon the incidence or risk of prosecution for the breach of its terms.

If, in fact, Phase II revisions are imminent and they go farther than Bill S-8 in meeting the concerns of Canada's educational institutions, then the educational defence provision (the proposed section 27(7)) could easily be abrogated as part of the Phase II revisions.

At the present time, however, the educational defence proposed in Bill S-8 is essential to Canada's ability to develop and disseminate knowledge. We strongly urge its adoption.